Herring & Co. who himself knew nothing of the external condition of the bales and cases or the internal condition of the goods concerned. No one in the firm of the plaintiffs who actually saw the goods on the opening up of the bales and cases gave evidence. According to Capt. Rivers of Herring & Co. who himself never saw the goods at all, the General Condition Survey "does not attempt to establish the details, extent of damage nor the cause of damage. No liability is involved at this stage". It only intends "to establish in general terms the amount of contents which may have been damaged".

With regard to this particular General Survey at C210 he said that only the external appearance of the cases was examined!

The Certificate of General Condition at C210 so far as relates to the plaintiffs' cargo on the *Jens Maersk* reads: —

"On the 17th, 18th and 19th days of January 1968, at the request of The British India General Insurance Co. Ltd., Bank of China Building, Battery Road, Singapore, we did attend at the Port of Singapore Authority Godowns Nos. 20A/D and R, for the purpose of conducting a general condition survey on consignments of Textiles which had been discharged ex s.s. 'JENS MAERSK', which vessel arrived in Singapore on the 24th day of December, 1967.

In Attendance: Mr. Ali representing Messrs. V.M.S. Abdul Razak

Consignment: 400 Bales Bleached White Cotton Cambric

D/O. No. 51551		— 335 bales delivered during our attendance said to be in apparent good condition.
A.R.C. S'PORE 401/800	— Bleached White Cotton Cambric	— 65 bales covers dry stained, opened and examined and each piece found slightly dry stained at edges.
V.M.S. R R. M 15244 S'PORE	— Metallic Fancy Shirting	— 1-case dry stained and iron band rusty, opened and examined and found to contain:
No. 3		27 pieces stained badly 11 pieces stained slightly 22 pieces in apparent good condition.
– „ – – „ – No. 9	– do –	— 1 case – do – 62 pieces stained slightly.
– „ – – „ – – „ – No. 1	– do –	— 1 case – do – 43 pieces stained badly 17 pieces stained slightly.
– „ – – „ – – „ – No. 2	– do –	— 1 case dry stained, opened and examined and found to contain 42 pieces in apparent good condition.
– „ – – „ – No. 4	– do –	— 1 case – do – 63 pieces stained badly 3 pieces stained slightly."

It would appear that, far from establishing the nature, extent or cause of damage to the goods in question, the report by Shammugan signed by Mr. F. Jones was also inadmissible for the same reasons as we have given in relation to the report of Mr. J. C. Jones signed by Mr. F. Jones on the *Lars Maersk* cargo.

There was accordingly, even on the basis of the Anglo-American survey report at C170 showing that 65 bales of bleached white cotton cambric covers were dry-stained and the contents slightly dry-stained at the edges of every piece, on which the plaintiffs also relied, no evidence of the nature, extent or cause of the damage to the *Jens* cargo on which the trial judge could reasonably conclude what damage if any was caused to the goods concerned during their carriage by the Lighterers from ship to shore in Singapore. Furthermore there was no Loss Assessment Survey as in the case of the *Lars Maersk* cargo. No one gave evidence of what had happened to the goods alleged to be damaged or at what price they had or could have been sold after arrival. There was accordingly no material on which the trial judge could conclude that it was fair and reasonable to allow the plaintiffs 50% in respect of the *Jens Maersk* cargo because they had claimed 65% damage in respect of the *Lars Maersk* cargo and been allowed 50% instead by Herring & Co. in their report. That report, we have found to have been wrongly admitted. Moreover, there was no evidence on which the principle of "*restitutio in integrum*" in assessing damages could be applied, *viz.*, that the claimant must be put back into the same position he was in before the damage was done. In cargo claims, this usually means the difference between "the sound market value of the goods at destination and their damaged value at that point" (see *Tetley* on Marine Cargo Claims, 1st Edition at page 79).

In our judgment, the appeals must therefore both be allowed.

Appeals allowed.

Solicitors: *Hilborne & Co.; Allen & Gledhill; Drew & Napier.*

TAN KIONG HWA v. ANDREW S.H. CHANG

[O.C.J. (Winslow J.) August 23, 1974]
[Singapore — Suit No. 2737 of 1972]

Agency — Secret profit — Duty to disclose — Agent director of company — Liability of agent.

In this case the plaintiff claimed the sum of $9,000 being a secret profit made by the Malaya Union Co. (Pte.) Ltd., of which the defendant was then the managing director as a result of a transaction in which the plaintiff claimed the defendant was his personal agent to sell a flat. The plaintiff had originally bought a flat from the company but before the sale was complete, he authorised the defendant in his personal capacity to sell the flat for $45,000. It appeared that the flat was sold for $54,000 and the sum of $9.000 was credited as "increment of selling price" to the company. The company subsequently went into liquidation.

Held: the plaintiff was entitled to the sum of $9,000 as the defendant was in a fiduciary position as agent and it was a breach of his fiduciary duty to the defendant for the plaintiff to do otherwise than to pay the $9,000 to his principal, the plaintiff.

Cases referred to:-

(1) *Bray* v. *Ford* [1896] A.C. 51.
(2) *Regal* v. *Gulliver* [1942] 1 All E.R. 392.
(3) *Boulting* v. *Association of Cinematograph, Television & Allied Technicians* [1963] Q.B. 137.

CIVIL SUIT.

K. E. Hilborne for the plaintiff.

Chan Chow Wang for the defendant.

Winslow J.: The simple issue before me is whether the plaintiff is entitled to claim from the defendant a sum of $9,000 being a secret profit made by the Malaya Union Company (Pte.) Ltd. (hereinafter referred to as the "Company") of which the defendant was then the Managing Director as a result of a transaction in which the plaintiff claims the defendant was his personal agent to sell a flat.

I accept the evidence of the plaintiff, as against that of the defendant, that he appointed the defendant in his private capacity to be his agent in selling flat No. 4A Ford Mansion which the plaintiff had agreed on 10th May 1969 to buy from the Company for $36,900 and that, before the purchase was completed, the plaintiff on 22nd December 1969, authorised the defendant, a business acquaintance of some 20 years standing, to be his agent for the purpose of selling this flat for $45,000 as set out in ABD2. The defendant, on the other hand, denies that he himself ever agreed to become his agent in his personal capacity and claims that he made it clear to the plaintiff in an earlier discussion that his Company would become the plaintiff's agent in this respect at a commission of 2% to the Company itself.

I find on the evidence that, on or about the 19th December 1969 *i.e.* before ABD2 was written, the plaintiff met the defendant in the lobby of Hotel Malaysia by chance at a time when he was feeling frustrated and angry with the treatment he had received at the hands of a clerk in the Company's office to whom he had applied some weeks earlier for the key of this flat and had been refused such key. Furthermore, according to him there had been a demand by the clerk for a sum of money which made him even more furious. It is small wonder that when he ran into the defendant he took the opportunity of telling him in English which both of them spoke that he "would like to sell the flat to somebody". According to the plaintiff the defendant replied "It is alright, I can sell it for you". He denies that the defendant told him "My Company will sell it for you". The discussion in the lobby lasted for about 10 minutes. He says that the defendant told him not to be angry and asked him to write to him personally, pointing to himself. He also says that the defendant told him "Write me a personal letter and confirm that you asked me to sell" and that the defendant said twice to him, "I will sell it for you". The plaintiff also says that the question of commission was discussed and that the defendant told him that his commission would be 2%.

The plaintiff says that during all the years he has known him he always knew the defendant as "Ah Hung" or "Hung" and that he never knew that he was "Andrew S. H. Chang". I accept his evidence in this respect that he did not know when he originally booked the flat in question and commenced payments that the Managing Director of the Company was his old friend "Ah Hung" or "Hung" because the name Andrew S. H. Chang was meaningless to him. He never associated his friend Hung with the Andrew S. H. Chang who was the Managing Director of the Company. It was only when he made the 3rd progress payment that he came to know for the first time that the Managing Director of the Company was his old friend Hung and I accept his evidence that if he had known who the Managing Director of this Company was at the time he booked the flat he would have asked for a special discount in the hope of getting the flat at a cheaper price. When in fact he did discover the true identity of the Managing Director of the Company on his coming to the plaintiff's office to collect such payment he did ask him for a discount but was told by the defendant that nothing could be done.

In response to the defendant's request at the hotel lobby to write to him personally the plaintiff on 22nd December 1969 wrote to him at ABD2 as follows: —

"Mr. Hung,
Malaya Union Co. Ltd.,
140-142 Robinson Road,
Singapore 1.
Dear Mr. Hung,

Re: Flat No. 4A (7A) Ford Mansion

I hereby authorize you to sell my flat (above address) for S$45,000 with 2% commission to you.

The buyer must pay an initial deposit of 10% upon confirmation of sale — the balance of which is to be paid to my solicitors, less the amount loaned.

This offer holds good for 2 weeks from today.

Sd. ROLAND K.H. TAN
22nd December 1969"

Before dealing with the reply to this letter it may be useful to refer to the defendant's version of preceding events relating to this flat and its original purchase by the plaintiff. The defendant says that he attached and still attaches no importance to the conversation in the lobby.

He did not even tell his counsel anything about it nor about a number of other matters which, as the evidence shows, were crucial to his defence, if true. I am satisfied that he has throughout invented a number of excuses or explanations, glibly and on the spur of the moment during cross-examination, in an attempt to whittle down the effect of the case against him personally and to justify his actions throughout his dealings with the plaintiff concerning this flat in respect of which he agreed to be appointed, at his own request, the plaintiff's agent to sell it. For example, I have no doubt that he invented the statement which he belatedly attributes to the plaintiff in the lobby, "I don't care what you sell it for — I want $45,000". I also have no doubt that it was only when he went to the plaintiff's office to collect the 3rd progress payment that the plaintiff came to know that he was the Managing Director of the Company and that he never initiated the sale of the flat to the plaintiff in the first instance, as he now claims, by persuading him to buy it. The flat was originally booked by Tan Yee Seng, a relative of the plaintiff and the defendant retracted his earlier statement that, in the presence of the relative, himself and the plaintiff, arrangements were made for him to re-sell it to the plaintiff. Later, he said that he never met Tan Yee Seng at all and that all these arrangements were made over the telephone.

So much for the background which he admits he never told his own counsel.

When Mr. Hung received ABD2 he replied to the plaintiff in his capacity as Managing Director of the Company in the following terms on 30th December, 1969 as at ABD3: —

"Mr. Roland K.H. Tan
12 Cairnhill Circle
Singapore, 9.
Dear Mr. Tan,

Re: Flat No. 4A (7A) "FORD MANSION"

We wish to refer to your letter dated 22nd December, 1969 authorizing us to sell your flat at S$45,000.00 with 2% commission for us.

We hereby wish to inform you that we have already sold your flat and the buyer has paid to us 10% equivalent to S$4,500.00 cash keeping with us and you are requested to come to our office to pick up the cash money as soon as possible.

In the same time, we have arranged with our solicitor: M/s. Richard Chuan Hoe Lim & Co. to pay you the balance less the amount of loan and we take the pleasure to enclose herewith copy of our letter to our solicitor M/s. Richard Chuan Hoe Lim & Co. which will be self-explanatory.

Yours very truly
MALAYA UNION CO., LTD.,
(Sd.) Andrew S.H. Chang
Managing Director"

Counsel for the defendant attaches great significance to this letter as well as ABD6 and ABD7 in which the plaintiff's then solicitors informed the Company's solicitors that the plaintiff "confirms the balance of the proceeds of sale is $22,600 due and payable by the sub-purchasers" and requested settlement of the same. This money was never forthcoming and, in disgust, the plaintiff instructed his solicitors as at Ex. P1 to return the deposit of $4,500 and call off the sale as they did on 25th February 1970.

It is contended for the defendant that it was the Company which was appointed the plaintiff's agent on commission at 2% to sell his flat and that the plaintiff did not protest when the Company wrote ABD3 to him. Moreover, it is contended that by acquiescing in the sale by the Company when he confirmed the balance due as at ABD7 he was in effect confirming the fact that he intended at ABD2 to appoint the Company as his agent.

It is also contended that having sued the Company in Suit No. 1502 of 1971 for specific performance of the original agreement of 10th May 1969 the plaintiff is barred from taking the present proceedings against the defendant.

I do not accept these contentions.

The person appointed the plaintiff's agent to sell was the defendant and not the Company on my understanding of ABD2 in the light of my acceptance of the plaintiff as an honest and truthful witness despite certain inaccuracies of recollection relating to time.

I find that he was feeling frustrated as a result of being thwarted by the Company's clerk when he met the defendant in the lobby of the Hotel Malaysia and gladly accepted the latter's offer to sell his flat for $45,000 at least, at 2% commission to himself. Prices of these flats were going up at the time and if the balance of $22,600 had been paid over to him without delay after ABD7 of 7th January 1970 was written, the matter may well have rested there. Unfortunately for the defendant, the plaintiff discovered that the flat had in fact been sold for $54,000 and, as the defendant admitted in evidence, what was stated in his letter on behalf of the Company at ABD3 was untrue when he informed the plaintiff that the property had been sold for only $45,000.

The defendant claims that secret profits of this kind are common if not universal amongst agents who never disclose to vendors what they actually sell properties for when the vendor states a fixed price. He agrees however that "for $45,000" means "for not less than $45,000".

I do not accept the defendant's contention in this respect on the evidence of the arrangement between the plaintiff and himself which establishes that he was to be the plaintiff's agent to sell the flat for $45,000 at least. The Company's letter at ABD25 of 5th January 1970 to their solicitors is significant. It reads: —

"Richard Chuan Hoe Lim & Co.
Bank of Singapore Building
1st floor, 34A Market Street
Singapore.
Attention: Mr. Ernest Lim
Dear Sirs:

Re: Flat No. 4A (new No. 7-A) at "FORD MANSION"

We wish to refer you to our letter dated December 30, 1969 ref: MU/AC/1269/2000 in which we have informed you that we have purchased the flat at S$45,000.00 from Mr. Tan Kiong Hwa, less 2% commission $900.00, less the amount of proposed loan $17,000.00 and less $4,500.00 to him, therefore balance to be paid is $22,600.00.

We shall be much appreciated if you will kindly prepare an agreement in the name of Mr. Ali Sjarif and send to his solicitor Ironside & de Souza, Clifford House, Singapore, 1 for the sale value of S$36,900.00.

When submitting the agreement to their solicitor, please attach our Architect Certificate to collect up to 75%: S$27,675.00 and please pay the sum of S$22,600.00 to Mr. Tan Kiong Hwa through his solicitor in order to cancel the sale agreement between Mr. Tan Kiong Hwa and our company.

Your prompt attention for the above will be much appreciated, we remain,

Yours very truly
MALAYA UNION CO., LTD.,
(Sd.) Andrew S.H. Chang
Managing Director"

It was never the plaintiff's intention that the property should be sold to or by the Company and that the Company should get a commission of 2% for this. It will be noticed that the Company instructed its solicitors that the resale value of this property was $36,900. The defendant tried to explain this away by saying that the new purchaser, Ali Sjarif, wanted to evade stamp duty but that he later changed his mind twice and altered the purchase price to $45,000 and then $54,000 in order that the person to whom the purchaser was selling it for $65,000 would not think that he, Sjarif, was "making too much profits".

The defendant's evidence to the effect that commission agency provided the greater part of the work of the company and not development is clearly disproved by its books of account which reveal that only a negligible portion of its receipts came from commissions.

The excess of $9,000 shown in the Company's Ledger as "increment of selling price" was only credited to the Company one year later on December 31st, 1970 because Sjarif, according to the defendant, did not pay up in full till October, 1970.

The Company went into liquidation on 14th July 1972.

The question is whether the profit of $9,000 made by the Company and credited it by the defendant in his capacity as its Managing Director when he himself was appointed the plaintiff's agent should have been disclosed to the plaintiff and, if so, whether the defendant is liable to pay the plaintiff this amount having regard to the duty of an agent to turn it over to his principal and not to any other person. Counsel for the plaintiff submits that, on a finding such as the one I have made, the plaintiff is entitled to this sum of $9,000 as it was a breach of his fiduciary duty to the plaintiff to do otherwise than to pay it to his principal, the plaintiff.

What has caused me some concern is whether a Managing Director of a company can, in his private capacity, accept an agency such as this having regard to the inflexible rule in equity that a person in a fiduciary position (such as an agent or a director) is not, unless otherwise expressly provided, entitled to make a profit without the knowledge and assent of the person to whom the duty is owed. (See *Bray* v. *Ford*[1] and *Regal* v. *Gulliver*[2] per Lord Wright). The defendant claimed early in his evidence, that he was "not allowed to make any private profit".

In my view, the only private profit he possibly could not make was the commission of 2%, which it was open to the Company to take action to recover from the defendant if he had kept it for himself. This he did not do. The secret profit of $9,000 which was never disclosed to the plaintiff could not in my view, have been properly retained by him or, for that matter, by the Company, assuming that the Company had been appointed agent in the first place.

Since the defendant was appointed agent and not the Company, as I find, it follows that the defendant is liable to make good this amount to the plaintiff. If this sum had not been credited to the Company and if the defendant had put it into his own pocket the Company could not, in my view, have successfully pursued any claim against the defendant on the ground that as its managing director he was bound to pay over to the Company whatever secret undisclosed profit he made as the personal agent of the plaintiff.

The question of any waiver of any rights against the defendant by the Company does not arise for two reasons — first, because there were no rights to waive and secondly, because the defendant caused the Company to be credited not only with the commission but the undisclosed profit as well.

The person entitled to the positive rule in equity referred to earlier is the person protected by it. As Upjohn L.J. said in *Boulting* v. *Association of Cinematograph, Television and Allied Technicians*[3]:

"Directors, trustees ... may sometimes be placed in such a position that though their interest and duty conflict, they can properly and honestly give their services to both sides and serve two masters to the great advantage of both ...

To sum up the position, it is clear that the person entitled to the benefit of this positive rule is the person who is protected by it, but he, and he alone, can in proper circumstances relax it ... It cannot be used as a shield by the person owing the duty ..."

It is clear that where a third party has been wronged the defendant cannot use the rule as a shield against such third party — in this case, the plaintiff.

In my judgment, the plaintiff succeeds in his claim for the secret undisclosed profit of $9,000 which he caused to be paid to the Company, with costs and there will be judgment entered in his favour accordingly.

Claim allowed.

Solicitors: *Hilborne & Co.; Chan Chow Wang & Co.*

CHAI AH KAU v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J.) September 6, 1974]
[Singapore — Magistrate's Appeal No. 104 of 1974]

Criminal Law and Procedure — Caning — "Youthful offenders" — "Adults" — Criminal Procedure Code (Cap. 113), s. 220.

In this case the appellant and three others had been convicted at one trial of the offence of armed robbery and at a subsequent trial, on the same day and by the same court, of another similar offence. He was sentenced in the first trial to 18 months imprisonment and 10 strokes of the cane and at the second trial to 3 years imprisonment and 10 strokes of the cane. The appellant was eighteen years of age at the time of his conviction and it was contended on appeal (a) that he was not an "adult" within the meaning of section 220 of the Criminal Procedure Code; and (b) that the sentence of ten strokes of the cane imposed in respect of the second conviction contravened the provisions of section 220 of the Criminal Procedure Code.

Held, dismissing the appeal: (1) section 220 of the Criminal Procedure Code was applicable only in the case where a person is committed at one trial of two or more distinct offences and was therefore not applicable in this case;

(2) the appellant being above the age of sixteen years was an adult within the meaning of section 220 of the Criminal Procedure Code.

MAGISTRATE'S APPEAL.

Wong Meng Meng for the appellant.

Loh Lin Kok (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J.: On 2nd April 1974 the appellant and three others appeared before a District Court. They were charged as follows: —

"That he and three others, on the 21st day of February, 1974, at about 2.25 a.m. at Mount Faber, Singapore, in furtherance of the common intention of them all, committed robbery of cash $300/- and 16 Bahts (Thai currency) in the possession of one Lee Lin Cheng and 1 plastic bracelet valued at $1/- in the possession of one Fang Jung Pin and in committing the said robbery they were armed with a sharp object and he had thereby committed an offence punishable under sections 392 and 397 read with section 34 of the Penal Code (Cap. 103)".

All of them pleaded guilty to the charge and admitted the facts as outlined to the court by the prosecution.